83-924

IN THE SUPREME COURT OF THE

UNITED STATES

CASE NUMBER _____

OCTOBER, 1983 TERM

VIVIAN W. GALANTI,
PETITIONER

VERSUS

UNITED STATES OF AMERICA,
RESPONDANT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID M. ZACKS
Counsel of Record for
Petitioner
Post Office Box 2043
Augusta, Georgia 30903
(404) 724-2622

RAYMOND G. CHADWICK, JR.
Co-Counsel for Petitioner
Post Office Box 2043
Augusta, Georgia 30903
(404) 724-2622

I. QUESTION PRESENTED FOR REVIEW.

A. Factual Predicate

This Federal Tort claim arises out of the failure of a federal law enforcement officer in Georgia to take appropriate action, the result of which was the death of an innocent bystander, Isaac N. Galanti. The law enforcement officer knew that a particular key federal government witness was in immediate danger of assasination. Such danger resulted from the use of the witness in a criminal investigation and prosecution. The officer also knew that the danger was heightened by the witness's regular pattern of visiting a particular tract of secluded land. He specifically warned the witness of this. The law enforcement officer also knew

that the witness was going to meet Galanti on the property on a particular day, and the officer recognized that both would be in danger at that time. The officer, however, neither warned Galanti, nor took any action to protect Galanti, nor informed local police authorities of the danger that existed. The officer did nothing. The witness and Galanti were shot and killed while visiting the property.

B. Issue

The question now before this Court is whether the Court of Appeals of the United States for the Eleventh Circuit should have certified an important and previously unaddressed question of Georgia tort law to the Georgia Supreme Court rather than deciding the question itself, the question being: whether a police officer in the State of Georgia owes a duty of

care to take action to warn or protect a citizen of Georgia whom he knows to be in reasonably forseeable danger from a criminal act, particularly when such criminal act was motivated by the performance of official duties (i.e. use of the witness in a prosecution) by the officer?

II. LIST OF THE PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

The parties to the proceedings in the Court of Appeals are Vivian W. Galanti and the United States of America.

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V. REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

The United States District Court for the Northern District of Georgia entered an order granting the motion of the defendant, United States of America, to dismiss on February 25, 1982. That decision was not published. Judgment was entered on the 26th day of February, 1982.

The United States Court of Appeals for the Eleventh Circuit rendered an opinion in this case affirming the district court's order. The court of appeals' order is reported at 709 F.2d 706 (11th Cir. 1983). The court then denied a petition for rehearing and a suggestion for rehearing en banc on September 6, 1983.

VI. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The petitioner, Vivian W. Galanti, is requesting that this Court grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the decision of that court rendered on July 11, 1983, and entered on that same date. Mrs. Galanti filed a petition for rehearing and suggestion of en banc consideration on July 29, 1983. The court of appeals denied that petition on September 6, 1983.

Section 1254(1) of Title 28 of the United States Code confers on this Court jurisdiction to review, by writ of certiorari, the judgment of the Court of Appeals.

VII. CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE.

Rule 36 of the Rules of the Supreme Court of the State of Georgia provides:

> (a) Certified Questions. When it shall appear to the Supreme Court of the United States, to any Circuit Court of Appeals of the United States, or to the Court of Appeals of the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such federal appellate court may certify such questions or propositions of the laws of Georgia to this court for instructions concerning such questions or

propositions.

(b) Formulation of Questions, Records, etc. The court certifying to this court a question of law shall formulate the question and cause the question to be certified and transmitted to this court, together with copies of such parts of the record and brief in the case as the certifying court deems relevant.

(c) Docketing, etc., of Questions. Such questions shall be docketed by the clerk as are other cases and the rules relating to oral arguments, briefs, motions, etc. in direct appeals shall apply.

(d) Costs. The costs in such proceeding shall be equally divided between the parties unless otherwise ordered by this court.

VIII. STATEMENT OF THE CASE.

A. Proceedings in the Court below.

The petitioner, Vivian W. Galanti, brought this action in the

United States District Court for the Northern District of Georgia to recover for the wrongful death of her husband, Issac N. Galanti, under the Federal Tort Claims Act, 28 U.S.C. §2671, et. seq., such claim being within the subject matter jurisdiction of the district court pursuant to 28 U.S.C. §1346(b). Following the conclusion of discovery, the parties submitted a proposed pretrial order which contained a statement of stipulated facts. On the basis of the facts, as established by the stipulation and the depositions of FBI Special Agent Paul V. King, Jr., United States Attorney Harvey D. Harkness, and Major Louis Graham of the Fulton County, Georgia, Police Department, the District Court granted the United States' motion to dismiss for failure to state a claim upon which relief can be granted.

Mrs. Galanti then appealed the order of the district court to the United States Court of Appeals for the Eleventh Circuit. The court of appeals affirmed the district court's order and also denied Mrs. Galanti's petition for rehearing and suggestion for en banc consideration.

B. The facts material to the consideration of the question presented.

Preliminarily, it should be noted that the pertinent facts set forth herein come from a stipulation submitted to the trial court, deposition testimony take of F.B.I. Special Agent Paul V. King, Assistant United States Attorney Harvey D. Harkness, and Major Louis Graham of the Fulton County, Georgia, Police Department, as well as documents produced by the United States during discovery.

Mrs. Vivian W. Galanti's claim arises out of the gang-land style assassination of her husband, Issac N. Galanti, and Roger Dean Underhill on a wooded, undeveloped parcel of property belonging to Mr. Underhill. The murders occurred just prior to the planned entry of Mr. Underhill into the federal witness protection program. Mr. Underhill was being placed in the witness protection program because of his past cooperation and expected future cooperation in the prosecution by the United States of Michael G. Thevis for past murders, extortion and rackerteering. As a direct result of the murders of Mr. Galanti and Mr. Underhill, Thevis was tried and convicted in federal court of violating Mr. Underhill's civil rights by having him murdered, along with the innocent bystander Mr. Galanti, in order to

prevent Mr. Underhill from testifying in the United States case.

During the time period pertinent to this case, Mr. Underhill was the key witness for the United States in its effort to convict Thevis for crimes arising out of two prior murders. Mr. Underhill had provided lengthy recorded statements to the FBI and had testified before a federal grand jury in 1977. Because of what was known to be an extreme danger to Mr. Underhill's life, the United States, in July of 1978, sought and received permission to perpetuate the testimony of Mr. Underhill for use in the pending criminal prosecution. The United States supported its request by relying upon prior attempts to kill Mr. Underhill.

At all relevant times, Special Agent Paul V. King, Jr. was the overall supervising agent for the FBI in the

Thevis case. Agent King, therefore, worked closely with Mr. Underhill, and as he testified, Agent King came to the conclusion that Mr. Underhill was a headstrong man who "had no fear, was very strongwilled, and was the type of person whose mind could not be changed when he decided upon a course of action." Agent King was also familiar with the government's psychiatric report on Mr. Underhill which stated that Mr. Underhill's behavior was "unpredictable" and "lacking necessary caution and judgment." This same report also contained the conclusion that Mr. Underhill did not take adequate precautions to protect himself and that he acted "incautiously."

In addition to his knowledge of Mr. Underhill's character, Agent King testified he was aware that Thevis had made prior attempts on Mr. Underhill's

life and that Thevis had, in the past, planned acts of murder by ambush in a wooded area with a high powered rifle, the modus operandi that was eventually employed in the assassination of Mr. Underhill and Mr. Galanti. Agent King further testified that he knew that after Thevis had escaped from federal custody (such escape occurring on April 28, 1978) and after the criminal indictment against Thevis was returned, Mr. Underhill became the object of an open contract on his life.

Agent King testified he was especially concerned about Mr. Underhill's safety whenever he was in Georgia because of the additional dangers that existed there. Agent King testified he was also aware of the particularly acute danger in which Mr. Underhill was placing himself when he (Underhill) was establishing a pattern

of conduct of daily visits to a wooded, undeveloped parcel of land near Atlanta which he owned and which he desired to sell. Agent King testified he specifically told Mr. Underhill that it was "foolish to go to the property and work on it on a daily basis." Mr. Underhill had been visiting the land and working on it during the week preceding the murders of himself and Mr. Galanti.

On October 24, 1978, the day before the murders, Agent King testified he was specifically aware that Mr. Underhill would be showing the wooded property to Mr. Galanti the following day. Agent King was also aware that anyone present with Mr. Underhill at the time of an assassination attempt by Thevis would also be shot. Despite such knowledge, Agent King testified he made no effort either to contact Mr. Galanti to warn him of the danger, or to notify

local police authorities of the planned visit to the property. He did not surveil, nor make arrangements for the surveillance, of the property for the time Mr. Underhill and Mr. Galanti would be present. He testified he made no arrangements for any federal or state authorities to be present at the time of the visit. Agent King, in fact, did nothing at all, even though he knew the exact date the property would be shown and of the extreme danger to Mr. Underhill and Mr. Galanti during their visit to the property.

During their October 25, 1978 visit to the property, Mr. Galanti and Mr. Underhill were shot to death.

IX. ARGUMENT AND CITATION OF AUTHORITIES.

This Court should issue a writ of certiorari to review the court of appeals' abuse of discretion in failing to certify an important and undecided question of Georgia law regarding the duty of law enforcement personnel to members of the public of that state whom its law enforcement personnel know to be in reasonably foreseeable danger from a reasonably foreseeable criminal act, such criminal act arising out of the performance of law enforcement duties by such law enforcement personnel.

Rule 17.1 of the rules of this Court state that review on writ of certiorari is appropriate when a federal court of appeals has "so far departed from accepted and usual course of judicial proceedings . . . as to call

for an exercise of this Court's power of supervision." As will be shown below, the court of appeals has departed from the accepted and usual course of judicial proceedings with its decision not to certify an unsettled and important issue of Georgia law. Review by this Court is necessary in order to correct the error that has occurred in this case and to provide guidance to the courts of appeals of the various circuits in their decisions whether or not to certify state law questions to the state courts of last resort.

The case sub judicie raises the issue of a duty under by Georgia law by law enforcement officers to members of the Georgia public whom the officers foresee to be subject to specific and immediate dangers from criminal acts, such criminal acts being precipitated by the performance of law enforcement

duties. The criminal acts were precipitated by law enforcement duties since the government granted Mr. Underhill immunity and used him as its key witness to make a case against Thevis. It was Mr. Underhill's role as a key witness that caused Thevis to want to kill him.

Although this case had been brought pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. §2671 et. seq., the law is settled that the existence of a cause of action in negligence must be determined by reference to state law, in this case Georgia law. See, Johnson v. United States, 576 F.2d 606 (5th Cir. 1978) cert. denied 451 U.S. 1018 (1981). The district court dismissed this action and the court of appeals affirmed that order on the basis of those courts' opinions as to the Georgia law on this novel

issue of the duty owed by law enforcement officers. In light of this Court's prior decisions, and the prior decisions of the courts of appeals for the Eleventh and other circuits, it was an abuse of discretion for the court of appeals to decide this state law question rather than certifying it to the Supreme Court of Georgia.[1]

A. Certification of difficult state law questions to state courts is the preferred method of resolving such questions.

The federal courts have, for some time, had the option to certify questions of state law to the courts of

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[1]Rule 36 of the Rules of the Supreme Court of the State of Georgia permits certification of questions from the Federal Courts to the Georgia Supreme Court.

last resort of the applicable states. See, e.g., Aldrich v. Aldrich, 375 U.S. 249, 85 S.Ct. 305 (1963); Greene v. American Tobacco Company, 324 F.2d 673 (5th Cir. 1963). The use of the certification procedure received its most significant endorsement in the case of Lehman Brothers v. Schein, 416 U.S. 386, 94 S.Ct. 1741 (1974). In that case, the plaintiffs had brought a shareholder's derivative diversity action in the district court for the Southern District of New York. The district court concluded that Florida law controlled and that, under Florida law, the complaint must be dismissed. On appeal, the Second Circuit agreed that Florida law controlled but disagreed as to what was the law in Florida. The court of appeals acknowledged that the issue involved had not been addressed by the Florida

courts, but the court of appeals proceeded to determine what position a Florida court would take if it were faced with this novel question. The court then found the complaint stated a cause of action under Florida law and reversed the district court's order. The defendants petitioned for rehearing in the court of appeals and requested that the question of Florida law be certified to the Florida Supreme Court. The court of appeals denied the petition.

On writ of certiorari, this Court vacated the judgment of the court of appeals and remanded the case so that the court of appeals could reconsider its decision on certifying the question to the Florida Supreme Court. This court recognized that certification "in the long run saves time, energy, and resources and helps build a cooperative

judicial federalism." Id. at 391, 94 S.Ct. at 1744.

This Court's decision in Lehman Brothers has since been construed as urging certification in appropriate cases. See, Boston Old Colony Insurance Company v. Balbin, 591 F.2d 1040, 1045 (5th Cir. 1979). Accordingly, courts have attempted to develop standards in order to determine which cases are appropriate for certification. In Florida ex rel. Shevin v. Exxon Corporation, 526 F.2d 266 (5th Cir.), cert. denied, 429 U.S. 829 (1976), the Fifth Circuit enumerated five (5) factors which it considered relevant to the determination of whether to certify a question:

> (1) Closeness of the legal question;
>
> (2) Existence of sufficient sources of

state law to allow principled rather than conjectural conclusions;

(3) Considerations of comity in light of the particular issues to be decided;

(4) Practical limitations, such as delay and inability to frame the issues; and

(5) Likelihood of the recurrence of a particular legal issue.

The use of these factors have been adopted by the Eighth Circuit, Hatfield v. Bishop Clarkson Memorial Hospital, 701 F.2d 1266 (8th Cir. 1983) (en banc) and presumably by the Eleventh Circuit, see Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir.

1981) (decisions of the Fifth Circuit prior to September 1, 1981 are binding precedent for the Eleventh Circuit).

In Lehman Brothers, the Supreme Court explicitly held that the use of the certification procedure rests in the sound discretion of the federal court. However, in Lehman Brothers, what the Court gave on the one hand, discretion to the federal courts, it effectively took away with the other, its judgment vacating the court of appeals' positive decision not to certify the question to the Florida Supreme Court.[2] Thus, this court

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[2] The concurring opinion of Justice Rehnquist clearly discloses that the defendants had requested certification in their petition for rehearing and that the court of appeals had denied the request. Lehman Brothers v. Schein, 416 U.S. at 392-393, 94 S.Ct. at 1745 (J.Rehnquist concurring). The same request and denial occurred in the instant case.

evidenced an intent that the discretion not to certify difficult questions of state law should be narrowly construed. On remand, the court of appeals did certify the question to the Florida Supreme Court. Schein v. Chasen, 519 F.2d 453, 454 (2nd Cir. 1975).

With Lehman as a guide, this Court has, on several occasions, certified difficult questions of state law to state supreme courts when the lower courts had declined to do so. Zant v. Stevens, _____ U.S. _____, 102 S.Ct. 1856 (1982); Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338 (1978). Similarly, the courts of appeals have often certified questions to state supreme courts. E.g., Walters v. Inexco Oil Company, 670 F.2d 476 (5th Cir. 1982); Allstate Insurance Company v. Young, 638 F.2d 31 (5th Cir. 1981); Cincinnati Insurance Company v.

City of Talledaga, Ala., 529 F.2d 718 (5th Cir. 1976); Walko Corporation v. Burger Chef Systems, Inc., 554 F.2d 1165 (D.C. Cir. 1977). More importantly, this Court and the courts of appeal have, despite the "abuse of discretion" standard enunciated in Lehman Brothers, remanded decisions of lower courts when those courts refused to certify questions in appropriate cases. Bellotti v. Baird, 428 U.S. 132, 96 S.Ct. 2857 (1976); Mills v. Rogers, _____ U.S. _____, 102 S.Ct. 2442 (1982); Hatfield v. Bishop Clarkson Memorial Hospital, supra.; Hiram Ricker & Sons v. Students International Meditation Society, 501 F.2d 550 (1st Cir. 1974). All of these cases indicate that the policies supporting certification of questions are so significant that, in the appropriate cases, refusal to certify a question is an abuse of discretion.

B. The facts and issues in this case demand certification of the state law issue to the Supreme Court of Georgia.

Both parties in the courts below have agreed that Georgia law controls the negligence issue in this FTCA action. See, Johnson v. United States, 576 F.2d 606 (5th Cir. 1978) cert. denied, 451 U.S. 1018 (1981). Under Georgia law, one of the essential elements of a negligence action is the existence of a legal duty to conform to a standard of conduct raised by law for the protection of others against unreasonable risks of harm. Bradley Center, Inc. v. Wessner, 250 Ga. 199, 200, 296 S.E.2d 693 (1982). The district court dismissed this case, and the court of appeals affirmed, on the basis of their conclusions that under Georgia law no such duty was owed by Agent King to Mr. Galanti. Thus, the

courts below resolved this case on the basis of their determination of state law, which, as will be shown below, is unsettled and because it is an issue of extreme important to the citizens of Georgia should be resolved first by the Supreme Court of Georgia.

As stated in the preceding section, five (5) factors are particularly relevant to the decision of whether a state law question should be certified to the appropriate state supreme court: (1) closeness of the question; (2) existence of sufficient sources of state law to allow principled rather than conjectural conclusions; (3) considerations of comity; (4) practical limitations, such as delay and inability to frame the issue; and (5) likelihood of recurrence of a particular legal issue. In the present case, an analysis of each of these factors yields the conclusion that the question before the

district court and the court of appeals regarding the duty owed to Mr. Galanti should have been certified to the Supreme Court of Georgia.

1. Closeness of the question and the lack of sufficient authority to allow a principled conclusion.

The closeness of the question in this case is evidenced initially by the inability of either party, or any of the courts below, to cite a case directly on point, i.e., a case in which a court determined the duty of a law enforcement officer to warn or otherwise protect a foreseeable victim of a specific and immediate danger. The instant case not only raises an issue of first impression in the Georgia courts, but, also, appears to be raising a question that has received little treatment throughout the United States judicial system.

Moreover, there is insufficient case law in Georgia to allow a court to make a principled, as opposed to conjectural, judgment as to the position a Georgia court would take on this matter. The court of appeals supported its decision with the argument that, as a general rule, one owes no duty to protect another merely because of knowledge of a foreseeable harm and the court's conclusion that the facts of this case do not fit within the exceptions recognized in Bradley Center, Inc. v. Wessner, supra. and United States v. Aretz, 248 Ga. 19, 280 S.E.2d 345 (1981); and Swanner v. United States, 275 F.Supp. 1007 (M.D. Ala. 1967), rev'd on other grounds; 406 F.2d 746 (5th Cir. 1969).

The problem with the court of appeals' analysis is that none of these cases which recognize the

exceptions to the general rule of no duty makes any statement regarding the exclusivity of these exceptions. In fact, in the cases principally relied on by the Court of Appeals, Bradley Center, Inc. v. Wessner, supra, and United States v. Aretz, supra the Georgia court found liability under relatively novel fact situations. The state court did not in any way declare that a legal duty could not rise from other novel sets of facts. Yet, this was the position taken by the court of appeals rather than allowing the Supreme Court of Georgia to render a decision on the novel facts of the instant case. Significantly, the cases cited by the court of appeals involved different exceptions to the general rule and neither of the cases even commented upon the existence of the other exceptions recognized by the Georgia court on a different set of

facts. Accordingly, the existence of cases recognizing certain exceptions to the general rule, without any express limitations on the exceptions, cannot be used to support the idea that no further exceptions exist. Again, however, the court of appeals has used this exact argument in order to resolve this case of first impression.

Furthermore, if a guess had to be made as to the position a Georgia court would take, the case law would support the conclusion that a duty existed in this case. The Bradley Center and Aretz decisions represent the expanding scope of duties of one person to another under Georgia law. Furthermore, Georgia law recognizes the common sense principle that law enforcement personnel owe a duty to the public whom they are charged to protect. For example, in Wood v. Morris, 109

Ga.App. 148, 151, 135 S.E.2d 484 (1964), the Court of Appeals of Georgia held that law enforcement personnel owe a duty to the public when they are performing tasks within the scope of their "customary role."[8] Given this recognition of a duty of law enforcement personnel to the public and the increasing liberality of the Georgia Supreme Court, as evidenced by the Bradley Center and Aretz decisions, a conclusion as to the opinion of the Georgia Supreme Court on the issue presented in this case would have to be in favor of the existence of a duty owed by the law enforcement personnel to Mr. Galanti.

On the basis of the above cases, which evidence the liberality of the Georgia courts in expanding the concept of the duty of one individual to another, and the absence of cases either

directly on point or expressly restricting the duty owed by police officers, no "clear path" can be discerned which supports the court of appeals conclusion that no duty was owned by Agent King to Mr. Galanti. See, Walters v. Inexco Oil Company, supra. Accordingly, the first two of the five factors relevant to a decision on certification, the closeness of the question and the existence of state law permitting a principled rather than conjectural conclusion, favor the use of certification procedures in this case.

2. Comity considerations.

Pursuant to the Erie doctrine, federal courts must decide state law issues. Problems with this arrangement arise whenever the state law questions before the federal court raise important public policy questions. In such situations, the principles of

"cooperative judicial federalism", Lehman Brothers v. Schein, 416 U.S. at 391, 94 S.Ct. at 1744, favor resolution of the policy questions by the state courts. As stated in Barnes v. Atlantic and Pacific Life Insurance Company of America, 514 F.2d 704, 706 (5th Cir. 1975):

> "[w]hen state law is in doubt, especially on underlying public policy aims, it is in the best administration of justice to afford the litigants a consistent final judicial resolution by utilizing the certification procedures."

In the instant case, the state law question raises fundamental and important questions of public policy in Georgia. What duties are owed by policemen to the public that are not owed by ordinary citizens? Should policemen be burdened with additional duties? Should private losses caused by

inadequate police action be spread on the public or suffered by the individual? The answers to these policy questions could, and likely will, have tremendous effect on the operation of law enforcement personnel within Georgia. Accordingly, the issues in this case "present questions of the gravest public policy . . ." Nardone v. Reynolds, 508 F.2d 660, 663 (5th Cir. 1975).

In light of the public policy concerns inherent in this case, certification of the question to the Supreme Court of Georgia is the proper method for resolving this extremely important state law issue. When one considers all of the insurance law questions that have been certified to the state courts, Cincinnati Insurance Company v. City of Talledaga, Alabama, supra; Allstate Insurance Company v.

Young, 638 F.2d 31 (5th Cir. 1981); and the medical malpractice issues that have also been certified, Hatfield v. Bishop Clarkson Memorial Hospital, supra; Nardone v. Reynolds, supra, it is clearly an abuse of discretion not to have certified to the Supreme Court of Georgia the question of the duty owed by a law enforcement officer to a citizen of that state. In the case most similar to this one, United States v. Aretz, the court of appeals found that the question of the duty of the United States in regard to employees of an explosives factory was, because of policy reasons, a question that should be certified to the Georgia court. 635 F.2d 485 (5th Cir. 1981). There is no way to rationalize the use of certification in that case and the refusal of certification in this case other than to find that the decision in

one of the cases was arbitrary. Clearly, the arbitrary decision between the two is the decision not to certify the question in the present case.

3. Practical considerations. The practical considerations that must be addressed are, generally, the delay and expense engendered by the use of certification procedures. Also, the ability to frame the question for the state court is a factor.

In the present case, the plaintiff is requesting certification. Since the party most often adversely affected by a delay is the plaintiff, consideration of delay is not important in this case. Furthermore, the additional expense of certifying the question should not be given great weight because of the extensive treatment of the pertinent legal issue

before the court of appeals and the ease with which the parties should be able to present those same contentions before the Supreme Court of Georgia.

As for the inability to frame the issues, the ability of the parties to stipulate most of the relevant facts should allow a court to frame the question with unusual specificity. Accordingly, the practical considerations do not militate against certification in this case.

4. Likelihood of recurrence of the issue.

The question of a law enforcement officer's duty of care to persons whom he knows are subject to a specific, immediate, and reasonably forseeable criminal act is potentially a very common question. This issue is present every time the police receive advance knowledge or warning of a

reasonably anticipated crime. Accordingly, the state law issue decided by the court of appeals was an issue that has a great potential for recurrence. In Hatfield v. Bishop Clarkson Memorial Hospital, supra, a state law question as to the tolling of a statute of limitations was considered a question likely to be recurring and, thus, particularly appropriate for certification to the Nebraska Supreme Court. Similarly, in Barnes v. Atlantic & Pacific Life Insurance Company of America, supra, the court of appeals held that a state insurance law question as to the effect of a binding receipt was appropriate for certification because of its potentially recurring nature. The court stated that such potentially recurring nature and the "many public policy factors affecting the welfare of local citizens, calls for

unequivocal resolution by the final court." 514 F.2d at 706. Similarly, the potential for recurring litigation involving the duties of policeman to the public make the present case one where certification should be required.

C. Conclusion.

As shown above, all the factors affecting a decision to certify questions to a state supreme court favor, if not demand, that the state law question of the existence or non-existence of a duty on the part of Special Agent King toward Mr. Galanti be certified to the Supreme Court of Georgia. In light of the overwhelming considerations in favor of certification, and the absence of any contrary considerations, it was an abuse

of discretion for the court of appeals to decline to certify the question. Accordingly, the petitioner, Mrs. Galanti, respectfully requests that this Court grant a writ of certiorari to the Eleventh Circuit Court of Appeals in order to review the court's judgment and, in that review, establish workable standards to guide the federal courts in the proper exercise of their discretion when addressing requests to certify state law questions to the state courts of last resort.

Respectfully submitted this 2nd day of December, 1983.

DAVID M. ZACKS

RAYMOND G. CHADWICK, JR.

APPENDIX

PART XI

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-8184

VIVIAN W. GALANTI,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States

District Court of the

Northern District of Georgia

July 11, 1983

Before RONEY and HILL, Circuit Judges, and MORGAN, Senior Circuit Judge.

LEWIS R. MORGAN, Senior Circuit Judge:

Vivian W. Galanti, plaintiff-appellant, brought this action against the government in the District Court for the Northern District of Georgia under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), claiming that her husband, Isaac N. Galanti, died as a result of negligence committed by an agent of the Federal Bureau of Investigation (FBI). The district court concluded that no actionable negligence exists under the pertinent facts and granted the government's motion to dismiss for failure to state a claim. We affirm the district court's order for the following reasons.

The facts giving rise to appellant's claim are undisputed.[1] In October of 1978, Isaac N. Galanti and Roger Dean Underhill were shot to death on a secluded tract of undeveloped property in Fulton County, Georgia. Galanti was interested in purchasing the property from Underhill, and the two men were inspecting it at the time of their deaths. Unknown to Galanti, Underhill was a key witness in the government's investigation into the criminal activity of Michael G. Thevis. Thevis, a convicted felon, had escaped from federal custody six months earlier and was still a fugitive at the time of the murders. He was apprehended a month later and eventually convicted in federal court of violating Underhill's civil rights by having him murdered,

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1 Our statement of the facts is taken from a detailed stipulation which the parties prepared and submitted to the district court.

along with the innocent bystander Galanti, in order to prevent Underhill's testimony in the government's case.

For serveral months before his death, Underhill traveled a great deal and kept a low profile, although he frequently contacted F.B.I. Agent Paul V. King, Jr. King was in charge of the Thevis investigation and knew that Thevis had made earlier attempts to kill Underhill. King considered Underhill to be in extreme danger at all times. For this reason, the government arranged for Underhill to enter a witness protection program in which Underhill would be given a permanent, new identity with government assistance, but Underhill refused to enter the program until he sold the undeveloped property in Fulton County. He ignored advice to retain a real estate agent and insisted on personally handling the sale of his

property. In the week preceding his death, Underhill repeatedly visited the property even though King advised him of the needless danger involved. On the night before the murders, Underhill called and informed King that he would be showing the property the next day to Galanti who had answered a newspaper advertisement. King made no attempt to contact and warn Galanti of the potential danger, nor did he arrange for surveillance of the property. This is the conduct which formed the basis of appellant's suit in the district court. She claimed that King's failure to warn or protect Nicholas Galanti against a specific, foreseeable danger was a negligent act and the proximate cause of her husband's death.[2]

[2] Mrs. Galanti also argued below that the government was negligent in allowing Thevis to escape from custody, but the district court concluded that this theory of relief was not properly included in the pleadings and refused to consider it. Appellant does not challenge that decision in this appeal.

[1, 2] This action was necessarily filed in federal court under the provisions of the FTCA since appellant seeks to hold the government liable for the negligence of its employee, but both parties agree that Georgia law controls the negligence issue. See Johnson v. United States, 576 F.2d 606 (5th Cir. 1978), cert. denied 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981). In Georgia, there are four essential elements of a negligence action:

(1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm;

(2) A breach of this standard;

(3) A legally attributable causal connection between the conduct and the resulting injury; and,

(4) Some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty.

Bradley Center v. Wessner, 250 Ga. 199, 200, 296 S.E.2d 693 (1982). It is the first element with which we are concerned in this appeal. The court below concluded that under no circumstances could appellant establish a legal duty owed by King to Nicholas Galanti, and accordingly granted the government's motion to dismiss for failure to state a claim. Appellant vigorously challenges this conclusion and relies on a large number of state and federal cases, some very recent, in order to support her argument. After a careful review of the various claims and the relevant law, we find that the district court's order must be

affirmed.[3]

[3-5] The general rule in Georgia is that one has no duty to warn or protect another person from a foreseeable risk of harm simply because of one's knowledge of the danger. See Bradley Center, Inc. v. Wessner, 250 Ga.

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[3] We note that the district court technically erred in granting the government's motion to dismiss for failure to state a claim because in doing so it went beyond the pleadings and considered the factual stipulation of the parties. Oaxaca v. Roscoe, 641 F.2d 386 (5th Cir. 1981). Appellant has failed to raise this issue on appeal, however, and we do not find it so egregious as to warrant reversal on our own motion. Appellant's briefs on appeal make extensive use of the factual stipulation in support of her arguments, which in our opinion waives any objection, and indeed these same facts would justify the district court's action on a motion for summary judgment. Therefore, the question of whether we treat the factual stipulation as an amendment to the pleadings and thereby remedy the error, or whether we consider the district court's order as a converted motion and order of summary judgment pursuant to Fed.R.Civ.P.12(c), is unnecessary to decide. See Concordia v. Bendekovic, 693 F.2d 1073 (11th Cir. 1982). The legal issue central to this appeal would remain the same.

199, 201, 296 S.E.2d 693 (1982); Thomas V. Williams, 105 Ga.App. 321, 124 S.E.2d 409 (1962). In other words, the mere foreseeability of injury to another person does not of itself create a duty to act.[4] This rule is not applicable in three distinct factual situations, however, and appellant contends that each of the three exceptions is present here. First, the duty to protect or warn against danger will arise if the defendant has in any way taken an affirmative step to create the danger. In the recent case of United States v. Aretz, 248 Ga. 19, 26, 280 S.E.2d (1981), the Georgia Supreme Court held that "where one by his own act, although

[4] The Second Restatement of Torts provides the best codification of this common law rule: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." Restatement (Second) of Torts § 314 (1965).

without negligence on his part, creates a dangerous situation, he is under a duty to remove the hazard or give warning of the danger so as to prevent others from being injured where it is reasonably foreseeable that this will occur." In that case, the United States Army provided one of its contractors with mistaken information concerning the appropriate storage classification of explosive materials. The Army later realized the mistake, but failed to communicate it to the contractor, and the materials exploded causing injury and death to several of the contractor's employees. The Georgia court, upon certification from the Fifth Circuit Court of Appeals, held that the Army's failure to inform the contractor of the change in classification was a breach of duty which arose when the Army mistakenly classified the materials in

the first place. The Aretz decision relied heavily on an earlier Georgia case, Hardy v. Brooks, 103 Ga.App. 124, 118 S.E.2d 492 (1961), where the defendant hit and killed a cow without negligence while driving his car on a public road. The Georgia Court of Appeals held that the defendant's act of killing the cow created the duty to act in the face of foreseeable danger to other drivers on the road. Therefore, Aretz and Hardy stand for the proposition that a duty to warn or protect a third person from danger will arise if the defendant affirmatively contributes to the creation of the danger. See also Lay v. Munford, Inc., 235 Ga. 340, 219 S.E.2d 416 (1975). In the present case, FBI Agent King did nothing to create the foreseeable danger. He was merely aware of the risk to Galanti and for whatever reason chose

not to act. Georgia law does not hold him legally responsible for knowledge alone.

[6] A second exception to the general rule concerns the defendant's failure to properly exercise his ability to control the foreseeably dangerous instrument. The most recent Georgia decision involving this principle is Bradley Center, Inc. v. Wessner, 250 Ga. 199, 296 S.E.2d 693 (1982). In that case, a private mental hospital released one of its patients despite its ability to keep the patient confined, and despite its knowledge that the patient might cause harm to a specific third party. Under these facts the Georgia court held that the hospital owed a legal duty to the third party even in the absence of the usual doctor-patient privity. Appellant argues that Bradley stands for the proposition that one must

always warn or protect a third person from a foreseeable criminal act, but this argument is incorrect. Bradley, and other cases like it, hold that the legal duty arises only if the defendant failed to exercise his ability to control the potential criminal. See, e.g., Johnson v. United States, 576 F.2d 606 (5th Cir. 1978). This is not the situation we are faced with here. Appellant has not alleged, and the relevant facts do not support the theory, that FBI Agent King or his associates had the ability and failed to control Michael Thevis.[5] Thevis was a wanted fugitive beyond King's control during the relevant time period, and thus King had no duty to warn or protect Galanti merely because of the danger posed by Thevis' known criminal intent.

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[5] See note 2, supra.

[7, 8] Finally, law enforcement officials may have the legal duty to warn or protect against danger if they have voluntarily assumed or incurred that duty to a specific individual. See, e.g., Swanner v. United States, 275 F.Supp. 1007 (M.D.Ala. 1967), and Miller v. United States, 561 F.Supp. 1129 (E.D.Pa. Apr. 15, 1983). However, this duty, if at all applicable here, would extend only to Roger Dean Underhill, and he repeatedly ignored warnings and refused protection. Appellant cannot cite to any Georgia statute or case which charges law enforcement officials with the duty to warn or protect members of the general public simply upon learning of a possible danger.

We recognize that the result in this case may appear harsh because Galanti's death very likely would have been avoided if King had chosen to act

rather than to remain silent. Nonetheless, Georgia law did not impose any legal duty on King to act on behalf of Galanti, and therefore appellant's complaint did not establish a viable claim. For this reason, the order of the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-8184

VIVIAN W. GALANTI,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

September 6, 1983

Appeal from the United States
District Court of the
Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before RONEY and HILL, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

PAUL H. RONEY
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VIVIAN GALANTI	)	
V.	)	CIVIL ACTION NO.
UNITED STATES OF	)	C81-579A
AMERICA	)	

February 25, 1982

O R D E R

On October 25, 1978, Isaac N. Galanti and Roger Dean Underhill were murdered while inspecting the latter's property on Riverside Drive in the Atlanta, Georgia area in connection with a contemplated real estate transaction. Underhill was a government informant who had been granted immunity from prosecution early in 1977 in return for aiding various law enforcement agencies of the United States in an investigation

of Michael G. Thevis and others, which investigation had culminated in a fourteen count federal indictment returned on June 10, 1978. This indictment alleged that Thevis and his associates had conducted an interstate pornography business through a pattern of racketeering activity in violation of the laws of the United States, such activities including, inter alia, two murders and numerous prior attempts to murder or arrange for the murder of Underhill on the part of Thevis. At the time said indictment was returned, Thevis was a fugitive from justice, having escaped from the New Albany, Indiana jail on April 28, 1978. Thevis, who at the time of his escape was a federal prisoner serving federal sentences and who was not due for release until April of 1979, had been transferred to that federal contract

facility on April 1, 1978, in order to facilitate his appearance in certain civil litigation. He remained at large until November 9, 1978, at which time he was apprehended in Bloomfield, Connecticut. Until the time of his ill-fated visit to Underhill's property, Galanti had not been involved in the Thevis proceedings.

It is apparent that government agents were aware that Underhill's life was in danger from as early as 1974 until the time of his death. In July of 1978, the United States sought and received permission from the United States District Court for the Northern District of Georgia to perpetuate the testimony of Underhill for the trial against Thevis, although the proposed deposition never took place. The United States supported its motion in this regard by stating that attempts to kill

Underhill formed several counts of the June 10, 1978 indictment against Thevis. On September 28, 1978, Underhill was authorized by the Attorney General of the United States to enter the Witness Protection Program (described in 18 U.S.C.A. preceding § 3481). Despite the urging of the government agents that he enter the Program immediately, Underhill declined to do so until he could take care of certain personal business, including the sale of his motor vehicle and the aforementioned Riverside Drive property.

In the week preceding his death, Underhill, his girlfriend, and her children had been working on the Riverside Drive property, clearing it and picking up trash in order to make it more attractive for sale, although Underhill had been warned by an FBI agent attached to the Thevis

investigation in Atlanta that it was foolish for him to work on the property. The night before he was killed, Underhill informed the FBI agent that he would be showing the property the next day to Mr. Galanti, that he had previously had conversations with Mr. Galanti about the property when it was up for sale the year before, and that he believed the present inquiry to be legitimate. The next day, Underhill and Galanti were ambushed and shot to death on the Riverside Drive property. As a direct result of such murders, Thevis was tried for conspiracy to violate the civil rights of Underhill by preventing him from testifying in the case against Thevis. Thevis was convicted of the federal crimes charged resulting from the murders of Underhill and Galanti (who was merely an innocent bystander), the substance of such crimes being that

Thevis and certain persons assisting him participated in and were responsible for such murders.

The instant suit was brought by the widow of Isaac Galanti pursuant to the provisions of the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., with jurisdiction predicated on 28 U.S.C. § 1346(b). The matter is presently before the court on the defendant's motion to dismiss, or, in the alternative, for summary judgment. The defendant has also filed a motion for continuance of the trial which is presently set for March 1, 1982. A motion for summary judgment would not be timely under the court's pretrial instructions; however, the defendant's motion to dismiss will be considered, although the court admonishes counsel that a motion to dismiss that is filed three weeks prior to trial does not promote the goal of

testing the legal sufficiency of the complaint at an early stage in the litigation, before extensive (and expensive) discovery has been initiated and completed by the parties.

The plaintiff alleges that the negligence of various government agents was the proximate cause of her husband's death. Specifically, it is her position that at the time that federal authorities persuaded Underhill to testify against Thevis, there arose on the part of those federal authorities a duty to protect not only Underhill but to warn and protect all of those individuals who could foreseeably be harmed as a result of the high degree of danger to Underhill. She contends that any person responding to Underhill's newspaper advertisement that was placed in connection with the intended sale of the Riverside Drive property was within

the scope of foreseeable harm.

The Federal Tort Claims Act provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. The corresponding jurisdictional provision provides that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law

of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The general purpose of the tort claims law is to permit recovery in the case of ordinary common-law torts. United States v. Smith, 324 F.2d 622, 625 (5th Cir. 1963); accord, Geo. Byers Sons, Inc. v. East Europe Import Export, Inc., 463 F.Supp. 135 (D.Md. 1979).

Turning to the case at bar, the court has concluded that there existed no duty on the part of the United States to warn or protect the plaintiff's decedent under the circumstances herein alleged. The cases cited by the plaintiff wherein the government had a duty and the ability to control the actor who caused the harm to a third person are distinguishable. See, e.g., Payton v. United States, 636 F.2d 132 (5th Cir. 1981), rehearing granted, 649 F.2d 385 (release of federal prisoner on

parole); Underwood v. United States, 356 F.2d 92 (5th Cir. 1966) (release of mentally ill airman from base hospital); Fair v. United States, 234 F.2d 288 (5th Cir. 1956) (release of mentally ill air force officer from base hospital). The court notes that although the plaintiff has also argued that the government was negligent in allowing Thevis to escape, the pleadings have never been amended to embrace this theory of negligence, and no motion to amend has been filed on behalf of the plaintiff. Therefore, this argument is not properly before the court.

The court is not persuaded to reach a contrary conclusion on the basis of the decisions in Swanner v. United States, 275 F.Supp. 1007 (M.D.Ala. 1967), rev'd, 406 F.2d 716 (5th Cir. 1969), on remand, 309 F.Supp. 1183 (M.D.Ala. 1970), as that case involved

the government's duty to provide a government informant and the members of his family with police protection, which is not the issue in the present litigation. The court notes that several decisions have held that in the absence of statute, there is no legally enforceable duty on the part of the government to warn or to compensate victims of criminal activity. Redmond v. United States, 518 F.2d 811, (7th Cir. 1975); accord, Peck v. United States, 470 F.Supp. 1003 (S.D.N.Y. 1979); see Turner v. United States, 248 U.S. 354 (1919). While this court would be hesitant to embrace such a sweeping statement for all possible situations, it is clear that no such duty was owed by the defendant to plaintiff's decedent under the circumstances of the present case. In light of the Supreme Court's admonition that the Federal Tort Claims

Act's "effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities," Feres v. United States, 340 U.S. 135, 142 (1950), the court concludes that the general obligation of law enforcement agencies to protect the public's safety and welfare cannot serve as the predicate for asserting governmental liability in the present case. Since there can be no actionable negligence in the absence of the breach of some legal duty, Ferrell v. Haas, 136 Ga.App. 274, 278 (1975), the defendant's motion to dismiss is hereby granted and sustained as the plaintiff's complaint fails to state a claim upon which relief can be granted. Because of this ruling, the court finds it unnecessary to address the other issues raised in the defendant's motion to dismiss, or, in the alternative, for

summary judgment; in addition, the defendant's motion for continuance (as well as any other pending motions relating to discovery) is hereby overruled and denied as having been rendered moot.

SO ORDERED, this 25 day of February, 1982.

G. Ernest Tidwell

G. ERNEST TIDWELL

Judge, United States District Court

CERTIFICATE OF FILING BY MAIL AND SERVICE UPON OPPOSING PARTY

I hereby certify that pursuant to Rule 28.2, I have this day deposited forty (40) copies of the attached petition for writ of certiorari in the United States Post Office, in a package with proper first class postage attached, the same being addressed to the Clerk of the United States Supreme Court, 1 First Street N.E., Washington, D.C. 20543.

Further, I hereby certify that I have on this same day deposited in a United States Post Office, with proper first class postage attached, three (3) copies of the attached petition for writ of certiorari to each of the following parties:

Solicitor General
Department of Justice
Washington, D.C. 20530

Nina Loree Hunt
Assistant U.S. Attorney
1800 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30335

This 2nd day of December, 1983.

David M. Zacks

DAVID M. ZACKS

Subscribed and sworn to before me this 2nd day of December, 1983.

Michelle C. Miller

Notary Public

State of Georgia

Notary Public, Richmond County, Ga.
My Commission expires July 4, 1987

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No. 83-924

In the Supreme Court of the United States

OCTOBER TERM, 1983

VIVIAN W. GALANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202)633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-924

VIVIAN W. GALANTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the court of appeals abused its discretion in declining to certify a state tort law question to the Georgia Supreme Court.

1. The facts are not in dispute. Petitioner's decedent, Isaac N. Galanti, was killed while in the company of a key government witness whose life had been repeatedly threatened by a convicted felon, Michael G. Thevis. The witness, Roger Dean Underhill, who was also killed in the incident, was to testify against Thevis in an upcoming trial. Thevis was later convicted in connection with the deaths. Pet. App. 3-4, 22-23.

Prior to the killings, Underhill had been in frequent contact with Paul V. King, Jr., an FBI agent, concerning enrollment in the federal witness protection program. Underhill insisted upon completing certain personal

business, including the sale of a parcel of land in a secluded area of Fulton County, Georgia, before entering the program. Underhill had made frequent visits to the land, with King's knowledge and against King's advice, to try to sell it. Galanti and Underhill were killed while inspecting the land. On the night before the killings, Underhill told King that he intended to meet Galanti on the land to discuss a real estate transaction. King did not warn Galanti or take any steps to protect him. Pet. App. 3-5.

Petitioner brought suit in the United States District Court for the Northern District of Georgia under the Federal Tort Claims Act (FTCA), which provides for federal tort liability "where * * * a private person would be liable * * * in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). The parties agree that Georgia law applies. The district court concluded that there existed no duty on the part of King under Georgia tort law to warn or protect Galanti under the circumstances of this case (Pet. App. 26). The court declined to find a general federal duty to warn or to compensate crime victims, citing this Court's "admonition that the [FTCA's] 'effect is to waive immunity from recognized causes of action and * * * not to visit the Government with novel and unprecedented liabilities.' " *Id.* at 28-29, quoting *Feres* v. *United States*, 340 U.S. 135, 142 (1950).

The court of appeals affirmed (Pet. App. 1-15). The general rule in Georgia, the court observed, is that a person has no duty to warn or protect another from a foreseeable risk of harm simply because of one's knowledge of the danger (*id.* at 8). It considered the three exceptions to that rule recognized under Georgia law: (1) a defendant's affirmative creation of the danger (*id.* at 9-12); (2) a defendant's ability to control the foreseeably dangerous actor (*id.* at 12-13); and (3) a defendant's voluntary assumption of a

duty to a specific individual (*id.* at 14). The court held that none of these exceptions applies to this case.

Petitioner then filed a petition for rehearing, with suggestion for rehearing en banc, asking for the first time that the question whether Georgia law would impose a duty on King be certified to the Georgia Supreme Court. The petition was denied without comment (Pet. App. 16-17).

2. Where applicable state law is genuinely in doubt, resort to state certification procedures "does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism." *Lehman Brothers* v. *Schein,* 416 U.S. 386, 391 (1974). However, as this Court has held, "[i]ts use in a given case rests in the sound discretion of the federal court" (*ibid*). That discretion was not abused in this case. Three judges of the court of appeals and the district judge surveyed applicable precedents and encountered no difficulty in concluding that petitioner's attempt to expand the scope of the "duty to warn" is not in accord with the law in Georgia. The district court found it "clear" that King owed petitioner's decedent no duty to warn under the circumstances of this case (Pet. App. 27), and the court of appeals concluded that petitioner had not cited "*any* Georgia statute or case" supporting her position (*id.* at 14; emphasis added). Moreover, petitioner can hardly complain of the courts' failure to certify, since she failed to request such certification until after the court of appeals had rendered its decision.[1]

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[1] Petitioner correctly points out (Pet. 29 n.2) that in *Lehman Brothers* certification was not requested until the petition for rehearing in the court of appeals. However, in *Lehman Brothers,* the petitioners had *prevailed* in the district court, which had rejected the respondents' proposed expansion of liability under state law. Only after the court of appeals adopted a construction that went well beyond then-existing state precedents did the petitioners have any reason to suppose that resort to state certification would be necessary. By contrast, petitioner

None of the special considerations making resort to state certification "particularly appropriate" in *Lehman Brothers* (416 U.S. at 391) is present here.[2] Unlike the federal court in New York struggling with unfamiliar Florida law in *Lehman Brothers*, the federal judges here were familiar with the state law to be applied and well able to evaluate whether certification was necessary or appropriate. Moreover, unlike the novel legal theory adopted by the federal court in *Lehman Brothers*, the principles governing this case were found by the courts to be clear and well-established. Petitioner cites no precedent from Georgia or any other jurisdiction recognizing a duty to warn under circumstances such as these (see Pet. 34). Thus, petitioner's assertion that her claim presents a close question of law warranting certification comes down to her hope that the "increasing[ly] liberal[]" Georgia Supreme Court would expand actionable tort duties (Pet. 38). But a plaintiff's hope for a change in state law is not sufficient to compel certification.

The other Supreme Court decisions cited by petitioner (Pet. 29-31) are beside the point. All reflect the "settled policy" of using certification to avoid unnecessary or premature constitutional decisions. *Mills* v. *Rogers*, 457 U.S.

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here is the party urging a novel construction of state law, which construction was rejected by the district court. If petitioner wanted to give the Georgia courts an opportunity to accept her proposed expansion of tort liability she should not have waited until after the case had been decided against her by two federal courts.

[2]Petitioner apparently concedes that the legal standard used by the Eleventh Circuit to decide whether to certify a question of state law is correct. Pet. 27-29, citing *Florida ex rel. Shevin* v. *Exxon Corp.*, 526 F.2d 266 (5th Cir.), cert. denied, 429 U.S. 829 (1976), and *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Thus, this case concerns merely the application of a concededly correct legal standard to this set of facts.

291 (1982); *Zant* v. *Stephens*, 456 U.S. 410 (1982); *Elkins* v. *Moreno*, 435 U.S. 647 (1978); *Bellotti* v. *Baird*, 428 U.S. 132 (1976). That policy has no application here, where no constitutional question is posed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984

DOJ-1984-01